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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

Docket No. 71-346

DAVID M. CRAWFORD,

Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

David M. Crawford, pro se
200 Park Avenue
New York, New York 10017

TABLE OF CONTENTS

	Page
Introductory Statement.....	1
I. Petitioner Did not Waive Oral Argument.....	2
II. Absence of Fair Warning..	6
III. "Ad hoc Litigation" of Rule 10b-5 has been Unfair and Confusing.....	9
Conclusion.....	10

TABLE OF AUTHORITIES

Cases:

Bertha J. Sibbach v. Wilson and Co. Inc. 312 U.S.1 (1940)...	3
Cady, Roberts & Co. 40 SEC 907 (1961).....	7,8
Dolgow v. Anderson EDNY (Oct. 21, 1971) CCH Fed Sec L. Rep 93,249.....	9
FCC v. WJR 337 U.S. 265 (1949).....	4
U.S. v. American Foreign S.S. Corp. 363 U.S. 685 (1960).....	3

	Page
Constitution, Statutes and Rules:	
United States Constitution: Fifth Amendment.....	6,9
28 USC 46.....	3,4,5
Securities Exchange Act of 1934: Section 10(b), 15 USC 78j(b).....	passim
Federal Rules of Appellate Procedure: Rule 2.....	5
Rule 40.....	4
Rules Under the Securities Exchange Act of 1934:	
Rule 10b-5, 17CFR240 10b-5..	passim
Miscellaneous:	
J. W. Moore, 1970 Rules Pamphlet pp. 851-2.....	3
Resolution of Judicial Conference of the United States, October 29, 1971.....	5

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INTRODUCTORY STATEMENT

Respondent cites as authority more than one hundred cases many of which were decided after petitioner's case. The developing body

of precedent based on petitioner's case should not be permitted to proliferate without review of novel and important principles by this Court.

New law that flouts due process and equity would be established by respondent, the SEC and the lower courts. It will require a full briefing and oral argument to apprise this Court of the many important substantive and procedural aspects of this case.

Until now this case has been injustice in the name of equity and an alarming perversion of our judicial traditions. If the inscription above this Court "Equal Justice Under Law" also means "Equal Justice under Equity" this case merits this Court's review.

I

PETITIONER DID NOT WAIVE ORAL ARGUMENT

Without citing any authority respondent contends that petitioner by failing to object to the order of May 2, 1968 waived oral argument before a statutory quorum of the en banc court (Res. Br., p. 47).

This Court has recognized that plain error of a fundamental nature can be raised at any stage of the proceeding by a party or by the court. This Court has said:

> "The District Court treated the refusal to comply with its order as a contempt and committed the petitioner therefor. Neither in the Circuit Court of Appeals nor here was this action assigned as error. We think, however, that in the light of the provisions of Rule 37, it was plain error of such a fundamental nature that we should notice it." Bertha J. Sibbach v. Wilson and Co., Inc. 312, U.S.1 at 16 (1940).
>
> See also, Moore 1970 Rules Pamphlet pages 851-852, 878, 880.

The Sibbach precedent for considering questions of fundamental error at any stage of the proceeding was recognized by this Court in its consideration of 28 U.S.C. 46 when the Solicitor General first raised the question of the interpretation of that section in his petition for writ of certiorari in U.S. v. American Foreign S.S. Corp. 363 U.S. 685 (1960). In the Court of Appeals Government counsel had not raised the question of the correct interpretation of 28 U.S.C. 46 and it was not until the question was raised in the dissenting opinion that the Solicitor General successfully urged the point in his petition for certiorari.

Following that precedent, even if petitioner had not on two previous occasions raised the question of oral argument before a statutory quorum of the en banc

court, such fundamental error would still be ripe for consideration by this Court.

Even if waiver of oral argument before a statutory quorum of the en banc court were possible, any such waiver by petitioner would have to implied, since none was expressed.

The Government infers waiver of oral argument because following the Court's order of May 2, 1968, which stated that the case would be considered "without further argument" (C.A.2 Docket No. 30882) "No motion for leave to present additional oral argument was made by any of the parties at that time" (Res. Br. p. 47).

However, at the first opportunity, in accordance with Rule 40 of the Federal Rules of Appellate Procedure, petitioner's counsel in his timely petition for rehearing specifically raised the issue that petitioner ought to be permitted oral argument before a statutory quorum of the en banc court. (Crawford Petition 9/8/71, Addendum 4).

In denying the petition for rehearing the Second Circuit ignored petitioner's affirmative and timely assertion that the Second Circuit had violated the procedure governing appeals proscribed by 28 U.S.C. §46.

Respondent cites Federal Communications Commission v. WJR 337 U.S. 265, 275 as authority for the Second Circuit's

denial of oral argument (Res. Br. p. 47), but that case involved denial of oral argument in the course of an administrative proceeding pursuant to a Federal statute which spelled out the procedure to be followed, and did not involve the question of denial of oral argument before a Court of Appeals.

Respondent also cites Rule 2 of the Federal Rules of Appellate Procedure to justify the Second Circuit's violation of 28 U.S.C. 46 (c) and (d) (Res. Br. p. 48). Even if Rule 2 can gloss the controlling statute the Second Circuit's order was effective May 2, 1968 and Rule 2 did not become effective until July 1, 1968.

Despite the SEC's efforts to convince the Court of Appeals that petitioner had waived oral argument before a statutory quorum of the en banc court, the court below did not refer to waiver in its opinion 446 F. 2d. 1301.

A resolution adopted by the Judicial Conference of the United States October 29, 1971 is additional authority that deviation from statutes governing appeals in the Federal Courts ought not be permitted without the express agreement of counsel. Paragraph VI of that resolution provides in part:

> "If practicable and agreeable to counsel the Court of Appeals may...permit submission without argument..."

Denial of oral argument before a statutory quorum of the en banc court has not been agreeable to petitioner's counsel. Moreover timely objection in his petition for rehearing September 20, 1968 and in his appeal to the Second Circuit, May 11, 1971, make clear that petitioner never expressly or impliedly waived oral argument before a statutory quorum of the en banc court.

II

ABSENCE OF FAIR WARNING

Fair warning in this case ought to be judged bearing in mind that petitioner has been found to have violated a statute sounding in fraud and deceit and enjoined for life from further violation because he purchased 600 shares of his company's stock believing that disclosure of important news concerning his company had already been made (320-1 JA).

Respondent contends (Res. Br. pp. 36, 37, 46) that the interpretation of §10(b) and Rule 10b-5 was well established at the time of petitioner's purchase so that the due process clause of the Fifth Amendment and well settled principles of administrative procedure were not violated. The fact is that prior to the act complained of there had been no judicial interpretation of the section or the rule which held that an act such as petitioner's violated either the statute or the rule.

Of the twenty cases respondent cites as affording petitioner "ample notice," ten were administrative proceedings, five of which were settled, so that the applicability of §10(b) and Rule 10b-5 to petitioner's facts had never been judicially determined in those proceedings (Res. Br. pp. 36,37, ns 41,42,43).

Of the ten judicially determined cases cited by respondent (Res. Br. p. 36 n. 41) three were decided after April 16, 1964, the date of the action complained of, so they could not have furnished petitioner with notice. None of the other seven cases cited by respondent concern an employee who, believing that news of a material fact concerning his company has already been announced, purchases his company shares.

Even if Cady,Roberts and Co. 40 SEC 907, an administrative proceeding of first impression not judicially reviewed, is regarded as precedent, it was misinterpreted by the District Judge and incorrectly applied to petitioner's case. The District Judge held that Cady,Roberts ruled that as soon as an announcement was released insiders could trade. (App. 42a). However, the Court of Appeals held that the District Judge misinterpreted Cady,Roberts and reversed him (App. 97a).

If Federal Court judges after months of deliberation can disagree as to the "SEC/Cady,Roberts" interpretation of Rule 10b-5, how can it be held that petitioner had "ample notice" of the "SEC/Cady,Roberts" interpretation?

Nor was that the only questionable interpretation of Cady, Roberts by the lower courts. In Cady, Roberts the Commission after talking about a "special obligation" traditionally required of corporate insiders, defined the obligation as resting on two principal elements. One of these elements was "the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing" (40 SEC 912). The phrase "knowing it is unavailable to those with whom he is dealing" distinguishes petitioner's case because at the time he ordered his shares he believed the material information was available to others (320-1 JA).

Moreover in Cady, Roberts the SEC found no fault with Cowdin, a Director of the company concerned as well as a registered representative of Cady, Roberts, who telephoned a partner in Cady, Roberts before the news of a dividend cut had been announced. In absolving Cowdin the SEC said that he "...probably assumed without thinking about it, that the dividend action was already a matter of public information.." (Id 917).

Petitioner testified that he believed the news was in the public domain at the time he placed his purchase order (320-1 JA), and there was no evidence introduced that this was not his belief, for there is none. Yet petitioner is held on the basis of Cady, Roberts to have had notice that

such a purchase violated Rule 10b-5 and he is enjoined for life because of it. Such is the "ample notice" which purports to satisfy the "due process" requirements of the Fifth Amendment of our Constitution.

III

"AD HOC LITIGATION" OF RULE 10b-5 HAS BEEN UNFAIR AND CONFUSING

Respondent would lull the court into believing that proceeding "...by individual, ad hoc litigation..." rather than by regulation has been satisfactory. (Res. Br. p. 47). On the contrary it has been unfair and confusing. Attesting to the unfairness and confusion, a District Court Judge after long consideration of a §10b, Rule 10b-5 case recently wrote:

> "Particularly where the law is changing, retroactive application by courts of unreasonably strict standards of disclosure can be quite unfair to those who acted in good faith and without violating any reasonable fiduciary standards. See e.g., as to contemporary confusion on the issue..." (Citing numerous articles) Dolgow v. Anderson CCH Fed. Sec. L. Rep. par. 93,249 (Oct. 21, 1971).

In electing to proceed "...by individual, ad hoc litigation..." rather than by regulation, the SEC has avoided its

own responsibility and unreasonably burdened the judiciary with the unnecessary task of clarifying Rule 10b-5. In this case both the District Court (App. 43a, 44a) and the Court of Appeals (App. 97a n. 18) have made clear that they believe the SEC should proceed by regulation in clarifying Rule 10b-5. The SEC has turned a deaf ear to the lower courts and it is time for this Court to speak.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari ought to be granted.

Respectfully submitted,

David M. Crawford
Pro se

December 7, 1971